AND
REPS.

No. 16-32

FILED
JAN - 6 2017
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION CENTER, et al.,

Petitioners,

v.

JANIS E. CLARK, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the Federal Arbitration Act requires that a power of attorney be read broadly enough to effect the formation of an arbitration agreement, when the power of attorney would not otherwise be so read if the construing State court sought only to be faithful to the expressed intentions of the principal.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288-290 (1921) (federal question exists where a State court's application of the State law of decision is premised upon a finding of fact that has the effect of excluding the application of federal law).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4 of the FAA, 9 U.S.C. § 4, provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition * * * for an order directing that such

> arbitration proceed in the manner provided for in such agreement. * * * If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT OF THE CASE

In the case below, the Kentucky Supreme Court interpreted and construed the two powers of attorney at issue as not encompassing the authority for the

agents to enter into pre-dispute arbitration agreements on behalf of their respective principals. This characterization of the lower court's action is in fact the characterization that the Kentucky Supreme Court gave its decision. This Court will accept this characterization as true if the characterization does not constitute mere subterfuge to obtain a result in evasion of federal law. *Cf. Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945) ("[I]t is not for us to consider the correctness of the non-federal ground unless it is an obvious subterfuge to evade consideration of a federal issue.").

The principals in this case were nursing home residents of a single nursing home, and the agents were family members of the respective principal. The underlying disputes in each case below involve allegations of personal injury and nursing home abuse.

In one power of attorney, the Kentucky Supreme Court held that the plain language of the instrument did not encompass the authority. In the other power of attorney, while the court determined that the literal language of the instrument plausibly encompassed the authority, the court held that the principal's intent to grant this authority could not be reasonably inferred from the language of the instrument.[1]

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[1] In Kentucky, determination of the intent encompassed in a power of attorney is a matter of law, and a matter for the courts. *Preston v. Henning*, 69 Ky. (6 Bush) 556 (Ky. 1869); *see also Clinton v. Hibbs' Ex'x*, 259 S.W. 356, 357-358 (Ky. 1924) (question of principal's intent a matter for the court and not a jury).

I. FACTUAL BACKGROUND

Both cases involved in this petition stem out of allegations of nursing home abuse of members of the Respondents' family (nursing home residents Joe Wellner and Olive Clark), committed by Petitioners ("Kindred") and their nursing home facility, Winchester Centre for Health and Rehabilitation (a/k/a Fountain Circle Health and Rehabilitation Center). It was alleged, and was taken as fact by the Kentucky Supreme Court below, that at the time of Joe Wellner and Olive Clark's admissions to Fountain Circle Health and Rehabilitation Center, the nursing home residents' respective attorneys in fact executed a separate pre-dispute arbitration agreement on behalf of each resident, ostensibly pursuant to written powers of attorney. Pet. App. 6-7. These arbitration agreements themselves "provided that all claims and controversies arising from the agreement or the resident's stay at the facility, including contract, tort, breach of statutory duties and other causes of action would be resolved under the agreement." Pet. App. 57. These agreements were optional, *i.e.*, they were neither a condition of admission nor a condition for the provision of health care at Kindred's facility. Pet. App. 17, 20.

Joe P. Wellner was a resident of Fountain Circle Health and Rehabilitation Center from August 16, 2008 until June 15, 2009, dying on June 19, 2009. Respondent Beverly Wellner, on behalf of the Estate of her husband and on behalf of his wrongful death beneficiaries, alleged in a Complaint in the Circuit Court for Clark County, Kentucky, that Joe Wellner sustained

numerous injuries at Kindred's facility, including falls; dehydration and malnutrition; pressure sores; infections; and improper wound care.

Olive Clark was a resident at this same Fountain Circle Health and Rehabilitation Center from August 16, 2008 until March 30, 2009, dying on April 4, 2009. While she was a resident in Kindred's facility, it is alleged that Olive Clark also sustained numerous injuries, including falls; dehydration; skin breakdown; infections; and medication errors. Respondent Janis Clark, on behalf of the Estate of her mother and on behalf of her wrongful death beneficiaries, filed a Complaint against Kindred in the Circuit Court for Clark County, Kentucky.

The Wellner power of attorney provided in pertinent part:

> 1. To receive, take receipt for, and hold in possession, manage and control all property, both real and personal, which I now or may hereafter own, hold, possess or be or become entitled to with full power to sell, mortgage or pledge, assign, transfer, invest and reinvest the same or any part thereof in forms of investment, including bonds, notes and other obligations of the United States deemed prudent by my said son in his discretion, with full power to retain the same without liability for loss or depreciation thereof.
>
> 2. To demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be

> or become due to me (including the right to institute legal proceedings therefor).
>
> 3. To make, execute, deliver and endorse notes, drafts, checks and order for the payment of money or other property from or to me or order in my name.
>
> 4. To, make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance.

Pet. App. 21-23. The Clark power of attorney provided in pertinent part:

> I, OLIVE G. CLARK . . . hereby constitute and appoint . . . my true and lawful attorney in fact, with full power for me and in my name, place, and stead, in her sole discretion, to transact, handle, dispose of all matters affecting me and/or my estate in any possible way.
>
> Without limiting or derogating from this general power, I specifically authorize my attorney in fact for me and in my name, place, and stead, in her sole discretion:
>
> * * *
>
> To draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds or agreements;
>
> * * *
>
> To institute or defend suits concerning my property or rights;

* * *

> Generally to do and perform for me and in my name all that I might do if present.

Pet. App. 18-19.

II. PROCEEDINGS BELOW

Upon motions filed in each case to compel arbitration, the Clark County Circuit Court initially ordered enforcement. However, the Kentucky Supreme Court subsequently entered a decision in the case of *Donna Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), *cert. denied*, 133 S.Ct. 1996 (2013), and Respondents moved for reconsideration.

In *Ping*, the Kentucky Supreme Court held that a power of attorney which does not contain an authorization for dispute resolution, does not encompass the power to execute an arbitration agreement. *Ping*, 376 S.W.3d at 593-594. Additionally, *Ping* specifically quoted the RESTATEMENT (THIRD) OF AGENCY § 2.02 (comment h. (2006)), which states that there are "[t]hree types of acts [that] should lead a reasonable agent to believe that the principal does not intend to authorize the agent to do the act." *Ping* at 593. These acts by the agent "will impose on the principal" unforeseen "consequences" such that the authority to engage in those acts will not be inferred. *Id.*; Pet. App. 27-28, 122-124. One category of acts are those that "create legal consequences" "significant and separate" from the primary transactions, having "major legal implications for the principal, such as granting a security interest

in the principal's property or executing an instrument confessing judgment." *Ping* at 593; Pet. App. 28 n. 10. The Kentucky Supreme Court in *Ping* held that "[w]e would place in this . . . category of acts with significant legal consequences a collateral agreement to waive the principal's right to seek redress of grievances in a court of law." *Ping* at 593. That court concluded, "[n]othing in Mrs. Duncan's power of attorney suggests her intent that Ms. Ping make such waivers on her behalf." *Id.*

Upon the precedent of *Ping*, the Clark County Circuit Court vacated its earlier orders granting the motions to compel arbitration, substituting therefor orders denying those motions. Pet. App. 126-127, 138-139. In each instance, the Circuit Court reached its decision premised upon absence of sufficient transactional authority in the respective power of attorney.

Kindred then filed motions for interlocutory relief in the Court of Appeals of Kentucky. Given the Kentucky Supreme Court's decision in *Ping v. Beverly Enterprises*, *see supra*, and the reliance of *Ping* upon the RESTATEMENT OF AGENCY, the Kentucky Court of Appeals denied relief. Pet. App. 121-125, 131-137.

Kindred next appealed to the Kentucky Supreme Court. Not surprisingly, the Kentucky Supreme Court interpreted the powers of attorney differently from one another, based upon their respective verbiage. The Kentucky Supreme Court's resulting opinion

was directed to interpreting the meaning and effect of the words in the powers of attorney.[2]

The Kentucky Supreme Court's reading of the Wellner power of attorney was straightforward. The Wellner power of attorney simply did not contain language even plausibly encompassing the arbitration agreement. The Wellner power of attorney included language granting the attorney-in-fact some authority over Joe Wellner's legal affairs, and language granting the power to contract regarding property. However, the Kentucky Supreme Court concluded that the instrument language that included "the right to institute legal proceedings" to recover money was insufficient because, self-evidently, executing a pre-dispute arbitration agreement is not the institution of any kind of legal proceeding. Pet. App. 35-36. As to the verbiage granting power to execute property contracts, while a chose-in-action is property under Kentucky law, the arbitration contract was fundamentally an exchange involving the parties' rights, rather than an exchange with reference to their property. The principal would not understand execution of a pre-dispute arbitration contract to be a property transaction, and the

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[2] Additionally, the lower court held (as it had in the past) that, pursuant to Kentucky's wrongful death statute, KY. REV. STAT. § 411.130, decedents do not have the authority to bind their wrongful death beneficiaries to arbitrate a wrongful death claim. Pet. App. 8-12. Under KY. REV. STAT. § 411.130, the decedent has neither a legal nor an equitable interest in the wrongful death claim. Kindred does not challenge this aspect of the court's ruling.

Kentucky Supreme Court concluded that this language was likewise insufficient on its face. Pet. App. 36-38.

The Kentucky Supreme Court determined that the Clark power of attorney did plausibly encompass the power to execute the pre-dispute arbitration contract on behalf of the principal, given the instrument's broad language. The instrument's language grants the attorney-in-fact power "to do and perform for me and in my name all that I might do if present," as well as granting general authority to execute contracts. Nonetheless, the Kentucky Supreme Court determined that it was not objectively reasonable to interpret the Clark instrument's language as including the agency power to execute pre-dispute arbitration contracts on behalf of the principal. Pet. App. 38-39. The Kentucky Supreme Court took the position that the meaning of a Kentucky power of attorney is not determined by the broadest possible inferences that can be drawn from its words; rather, a Kentucky power of attorney's meaning derives from the readable intentions of the principal. Pet. App. 39. A universal but generally-worded grant of agency was insufficient to demonstrate that the principal had manifested the intention for the attorney-in-fact to have the power to enter into pre-dispute arbitration agreements.

The Kentucky Supreme Court considered the Kentucky Constitution's characterization of the right to trial to inform the principal's reasonable expectations of the meaning of language in Kentucky instruments. Pet. App. 41-43. The Kentucky citizen-principal, being

master over his or her own legal affairs, does not evince an intention for an agent to have the ability to remove that principal from the judicial system vis-à-vis another party, in an irrevocable and unbreakable perpetual agreement, unless the principal specifically grants the agent this power. *See* Pet. App. 43.

There were two Dissenting Opinions. Justice Abramson (now Hughes) wrote one Dissent, joined by Chief Justice Minton and Justice Noble. Justice Abramson had authored the *Ping* Opinion, and she attempted to distinguish its circumstances from those of Wellner and Clark. *See* Pet. App. 84.

Justice Noble also wrote a Dissent, joined by Chief Justice Minton. She wrote separately to emphasize what she considered to be a general error in the Kentucky Supreme Court's power of attorney jurisprudence. She contended that the Kentucky Supreme Court was in effect erroneously converting general powers of attorney into specific powers of attorney by limiting general powers of attorney to the illustrative powers recited in the instrument. Pet. App. 109, 111-112.

SUMMARY OF ARGUMENT

Neither Olive Clark nor Joe Wellner signed the Arbitration Agreements in question. So, at the end of the day, some court is going to have the final say in interpreting and construing the Wellner and Clark powers of attorney. Even Kindred cannot avoid this

proposition. The court having the final say on these powers of attorney interpretations should be the Supreme Court of Kentucky.

The Question Presented by Kindred mischaracterizes the nature of the lower court's decision. The Kentucky Supreme Court did not announce a rule of contract law. Nor did it interpret a contract. Rather, the Kentucky Supreme Court applied rules determining the intentions of the principals in this case.

The Kentucky Supreme Court confirmed that Kentucky powers of attorney are affirmative grants of authority, conferring only those powers the principal would expect to flow from the language used in the instrument. The Kentucky Supreme Court took the Kentucky Constitution as one gauge of the reasonable expectations of a principal with regard to language used. The State Constitution assigns special significance to the trial rights of Kentucky citizens. Thus, because the State Constitution assigns this significance, the Kentucky Supreme Court held that a principal in Kentucky does not expect that an agent would be able to waive the principal's trial rights pre-dispute, without such power specifically set forth in the instrument.

On its face, the FAA does not exist to make arbitration contracts easier to form, and it does not preempt State law regarding issues of contract formation. "[The] purpose [of the FAA] was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place

arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (*citing Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220, and n. 6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, n. 4 (1974)). The FAA exists to ensure that arbitration agreements are as enforceable as any other contract and preempts State law that stands as an obstacle to enforcing arbitration contracts as written. However, requiring proper authority of an agent to execute a contract on another's behalf is a question of contract formation, and is no obstacle. If the FAA could preempt any need for specificity in a power of attorney regarding arbitration, then it could theoretically preempt the need for any particular requirement of language at all. Such a result would be overreach. Powers of attorney are the creatures of their principals, and not creatures of legislative policy.

Because the scope of an agent's authority is a matter of interpretation of the intentions and expectations of the principal, Kindred's proposed novel construction of the FAA here would run afoul of the Separation of Powers doctrine. The FAA preempts State law rules that operate to render an arbitration agreement unenforceable, *see, e.g.*, *DIRECTV v. Imburgia*, *infra*. The FAA cannot preempt a State court's determinations of a principal's intentions in a document.

Adoption of Kindred's construction of the FAA would have long-reaching ramifications. Unlike contract law, the law of agency has not traditionally incorporated public policy considerations. Assuming a

lawful purpose, power of attorney interpretation has confined itself to producing a faithful translation of the intentions of the principal. Partially federalizing American power of attorney law in order to show deference to federal policy choices is unwarranted by the FAA and threatens to federalize generally the State law on agency.

ARGUMENT

Kentucky has not adopted the Uniform Power of Attorney Act, nor any other equivalent statutory scheme. As such, interpretation of Kentucky powers of attorney remains as developed under the Common Law of Kentucky. *Compare with* UNIF. POWER OF ATTORNEY ACT § 203.[3] It is noteworthy, however, that the Uniform Power of Attorney Act provides this:

> The ***meaning*** and ***effect*** of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

UNIF. POWER OF ATTORNEY ACT § 107 (emphasis added); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 292(2) (1971) ("The principal will be held bound by

[3] Section 203 suggests that a grant of contract authority as to a particular subject matter authorizes the agent to enter into pre-dispute arbitration agreements with respect to any dispute involving that subject matter.

the agent's action if he would so be bound under local law of the state where the agent dealt with the third person."). As such, this Court should recognize that the last word on the ***meaning*** and ***effect*** of these, Kentucky powers of attorney, like the last word on the meaning and effect of Kentucky statutes, lies with the Kentucky Supreme Court.

I. The FAA does not reach to the formation issue addressed by the Kentucky Supreme Court's decision below.

9 U.S.C. § 2 explicitly preserves intact certain contract defenses to the enforcement of an arbitration agreement. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) ("§ 2's saving clause preserves generally applicable contract defenses. . . ."). 9 U.S.C. § 4 explains that a U.S. District Court will make an order directing the parties to proceed to arbitration unless that court is persuaded that the making of the agreement is in issue:

> The court shall hear the parties, and upon being satisfied that ***the making of the agreement for arbitration*** or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . .

9 U.S.C. § 4 (emphasis added).

The conditioning phrase, "making of the agreement," in the FAA signifies that those State contract

defenses preserved intact by the FAA include those negating the prima facie showing of a contract. *See* 9 U.S.C. § 4; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 353 (2011) (California's *Discover Bank* rule preempted by FAA because the rule did not pertain to the making of an arbitration agreement) (Thomas, J., *concurring*); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 288 U.S. 395, 412-413 (1967) ("Sections 2 and 3 of the Act assume the existence of a valid contract. They merely provide for enforcement where such a valid contract exists.") (Black, J., *dissenting*). One such preserved defense would be the absence of authority to execute the arbitration contract on behalf of the bound party. *Cf. Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n. 1 (2006) (distinguishing as separate the question of whether an arbitration agreement was "ever concluded," from the question of whether the agreement was void *ab initio* due to illegality).

A. The FAA does not preempt determinations under State law that no agreement ever formed.

A contract is of course, an agreement of minds for an exchange of sufficient consideration. *Edwards v. Kearzey*, 96 U.S. 595, 599-600 (1877). There must exist competent parties and assent for the consideration exchanged. Here, the Kentucky Supreme Court determined that both parties to the contract did not assent, because one of the parties was absent. No prima facie contract.

For statutory rights to vest premised upon the existence of a certain type of contract, it is axiomatic that the contract must first exist. It would be an exercise in circular reasoning to appeal to those rights as the mechanism ***whereby*** the contract arises. That is, whatever Kindred might wish, no statute engenders a contract unilaterally. True, presumptively an arbitration agreement in itself constitutes sufficient consideration. However, a signature on the signature line of a contract does not constitute presumptive assent of the parties to the contract, if the signature is not that of the party to be bound. The burden of demonstrating the authorization of the signature would still exist, and would have to be proven by reference to instruments and facts outside the ambit of the contract, and of the FAA. These facts are in essence a condition precedent for the showing of the contract, notwithstanding a statutory purpose to favor such contracts. Put another way, the *a priori* existence of an arbitration agreement – the agreement being the *sine qua non* for vesting a right to demand federal preemption of State law – cannot arise by virtue of the preemption mechanism.

B. This Court's cases upon which Kindred relies have been directed to provisions of State law rendering arbitration agreements unenforceable either in whole or in part.

In each of the three cases most relied upon by Kindred, enforceability as written, rather than formation, was the issue. In *AT&T Mobility LLC v. Concepcion*,

563 U.S. 333 (2011), an arbitration clause in a consumer contract in California included a class action waiver. Yet, California law prohibited just such waivers in the context of consumer contracts of adhesion (California's *Discover Bank* rule), and, as such, the U.S. Court of Appeals for the Ninth Circuit found the arbitration clause unconscionable and unenforceable. This Court reversed, holding that the *Discover Bank* rule, as applied to arbitration agreements, would have a disproportionate impact on arbitration and was thus preempted by the FAA. The formation of the agreement was not in issue. Rather, *Concepcion* involved solely a question of whether an agreement would be enforced as written.

In *DIRECTV v. Imburgia*, 136 S.Ct. 463 (2016), the defendant media corporation provided a form contract to its California consumers, and, like the contract in *Concepcion*, it included an arbitration clause excluding class action arbitration. The clause was conditioned, however, on the availability, *i.e.*, the viability, of the class action waiver. Per the terms of the clause, if local law refused to enforce the class action waiver, then the arbitration clause itself would not be enforced. Post-*Concepcion*, the condition for revoking the arbitration clause could only be triggered if the lower court imported defunct law (California's *Discover Bank* rule) into the contract. The California appellate court did just that, holding that the arbitration clause was unenforceable because the law at the time of the contract's inception included the *Discover Bank* rule.

This Court reversed and remanded, holding that any California contract rule that imported defunct law into a contract having the effect of rendering an arbitration agreement unenforceable, was preempted by the FAA. Again, the formation of the agreement was not in issue – only its enforceability. "[T]he contract refers to 'state law' that makes the waiver of class arbitration 'unenforceable,' while an invalid state law would not make a contractual provision unenforceable." *DIRECTV v. Imburgia*, 136 S.Ct. at 469.

Finally, in *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996), the Montana statute at issue provided in a subsection (now repealed):

> (4) Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, ***the contract*** may not be subject to arbitration.

MONT. CODE ANN. § 27-5-114 (1996) (emphasis added). Again, this is an issue of enforceability. Thus, the Montana statute on its face assumed the prima facie existence of the contract. In sum, every instance cited by Kindred as authority for FAA preemption involved an existing prima facie arbitration contract, and a State court or State law refusing to enforce that contract as written, and is therefore distinguishable from the case at hand.

C. The Kentucky Supreme Court's interpretation of the powers of attorney do not constitute an obstacle to the formation of an arbitration agreement.

Kindred goes on to argue that the FAA also preempts any State law prohibiting, or acting as an obstacle to, the prima facie ***formation*** of arbitration contracts. Kindred implicitly relies upon a broad proposition from *Concepcion* for this argument.

> Although § 2's saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as ***an obstacle*** to the accomplishment of the FAA's objectives. *Cf. Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 120 S.Ct. 1913, 146 L.Ed.2d 914. The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.

AT&T Mobility LLC v. Concepcion, 563 U.S. at 334 (emphasis added); *see also Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990) (holding via declaratory judgment, a Virginia law prohibiting the inclusion of arbitration clauses in automobile dealer contracts preempted by the FAA).

Assuming *arguendo* that the FAA does reach to formation as well as enforceability issues,[4] the Kentucky

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[4] Again, the purpose of the FAA is to reverse "the judiciary's longstanding refusal to enforce agreements to arbitrate," *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 219-220, and "to make

Supreme Court's decision is still not an "obstacle." Certainly the "obstacle" here is neither one of statutory law, *e.g.*, the circumstance found in *Saturn Distribution Corp. Williams*, *supra*, nor is it a categorical prohibition of pre-dispute arbitration agreements in certain contexts, *see Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012) (vacating and remanding a West Virginia Supreme Court decision opining that the FAA was never intended to apply to personal injury actions and that public policy precluded enforcing arbitration agreements in certain circumstances). The decision below is an interpretation of what the principal meant in an instrument appointing an agent.

Kindred argues at length that the Kentucky Supreme Court's interpretive decision below operates as an "obstacle," in exactly the same manner as the Montana statute at issue in *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996). Not so.

In *Casarotto*, Montana required arbitration clauses in adhesion contracts to be set out distinctively from other clauses in the contract. The Montana law at root was ostensibly engineered to ensure assent of the parties to arbitration clauses, and assumed that an arbitration clause might be a provision unexpected by an unsophisticated party assenting to the contract. In Kindred's view, the Kentucky Supreme Court has likewise created "an explicit-reference requirement that is

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arbitration agreements as enforceable as other contracts, but not more so," *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. at 406 n. 12. Thus, an obstacle to the formation of an arbitration agreement is not an obstacle for the purposes of the FAA.

not applicable to other kinds of contracts," Pet. Br. *passim*, apparently for the purpose of double checking the assent of the parties.

Yet, the analogy to *Casarotto* fails structurally. The contract at issue in *Casarotto* undoubtedly contained explicit language regarding arbitration. It did not, to use a hypothetical example for contrast, provide language for arbitration only plausibly, *e.g.*, "the parties agree that they will engage in timely and efficient resolution of disputes involving this contract." Yet, this hypothetical language would perhaps be the closest analogue to the circumstance faced by the Kentucky Supreme Court below.[5] Conversely, the Kentucky court's decision here did not require special execution rules for power of attorney language conveying authority over pre-dispute arbitration agreements. Unlike *Casarotto*, the Kentucky Supreme Court did not require additional signatures, special fonts, or special notarization of arbitration language in a power of attorney or of the power of attorney as a whole. Additionally, Montana placed its demand upon the arbitration agreement itself, and it did so as a (legislative) mandate, rather than as an interpretation of the intentions of a contracting party.

These structural points notwithstanding, the seminal distinction between the circumstances is this: The Montana statute served to encumber arbitration and placed arbitration provisions in a contract in a suspect status. The Kentucky Supreme Court's interpretive

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[5] Such hypothetical language would plausibly mandate arbitration, but it does not explicitly mandate arbitration.

rules do no such thing. The lower court merely requires that language directed to arbitration be included in the power of attorney demonstrating that arbitration had been contemplated.

In order for a power of attorney to include agency power to execute pre-dispute arbitration agreements, presumably ***some kind of language*** is going to be required in the instrument to permit the reading-in of such a power. As such, designating that language cannot be an encumbrance.

Yet Kindred calls it an encumbrance. Self-evidently, Kindred wants the acceptable language to be more ambiguous. But why should a party prefer more ambiguous language over less ambiguous language in the customer's power of attorney, unless the party wished to foster inadvertently-concluded contracts?

There is no evidence in the FAA to suggest that this is the Congressional purpose. Setting aside the complete absence of Congressional statutory history for such an adventure, the FAA on its face simply does not exist to influence extrinsic instruments and mechanisms of agency, *e.g.*, powers of attorney, corporate bylaws, State guardianship schemes, etc. It certainly does not exist to compel arbitration through displacing a court's interpretive function applied to agency mechanisms. *See argument infra*. Should this Court take the position that, unless otherwise provided, general agents have the innate authority to execute arbitration agreements, this proposition would in effect convert private instruments of agency from creatures of their principals, to retainers of the U.S. Congress and its policies. As this Court is aware, "'no legislation pursues

its purposes at all costs,'" *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013) (*quoting Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987)), not even the Federal Arbitration Act.

This is exactly what one of Kindred's Amici explicitly demands. "In light of the emphatic federal policy in favor of arbitral dispute resolution, a power of attorney that authorizes an attorney-in-fact to enter contracts must unambiguously exclude the authority to enter into arbitration agreements before such an instrument can be held not to convey such authority in a case subject to the FAA." Amicus (American Health Care Association) Br. 4 (emphasis omitted).

While the Amicus proposal might seem to further the objective of encouraging arbitration of disputes, it certainly appears nowhere in a plain reading of the FAA, nor is it implied. Moreover, such a rule flies in the face of this Court's own precedent, requiring arbitration to be ***chosen***. Arbitration is a matter of "consent," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010), *i.e.*, a matter requiring parties' affirmative disposition, and not a matter of "coercion," *id.*, *e.g.*, a default acquiescence created by federal policy rather than the contracting party.

Words must be used in ***choosing*** arbitration by a party, and thus words must be used by a principal in granting an agent the power to ***choose*** arbitration. That the Kentucky Supreme Court has fixed upon the verbiage signaling the intention for an agent to hold

such power – as opposed to fixing upon alternative, vaguer verbiage – is not an obstacle to arbitration. Again, some words are necessarily required. So long as those words are specified with some assurance by the State court, there is no impediment.

II. The Kentucky Supreme Court's decision below announced rules for interpreting and construing powers of attorney in Kentucky; it did not announce a rule of contract law.

If the Kentucky Supreme Court had found sufficient agency in the Clark and Wellner powers of attorney, it would have enforced the arbitration agreements as written.

> There is no dispute that if the arbitration agreements were validly formed, they are enforceable as written under both the Kentucky Uniform Arbitration Act (KUAA), KRS 417.050 et seq., and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq., at least with respect to the decedents' claims for personal injury and statutory violations.

Pet. App. 24; *see also Schnuerle v. Insight Communications Company, L.P.*, 376 S.W.3d 561 (Ky. 2012) (enforcing arbitration agreement in context of consumer internet service agreement); *Hathaway v. Eckerle*, 336 S.W.3d 83 (Ky. 2011) (enforcing arbitration agreement in context of automobile purchaser's dispute with auto dealership); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 855 (Ky. 2004) ("'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of

arbitration. . . .'") (*quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983)).

Again, there are two different powers of attorney at issue in this case, and they apply distinctive language, and different grants of agency. The lower court held that it would not interpret the Wellner power of attorney as encompassing the power to execute pre-dispute arbitration contracts because the language used reaching to (1) power over legal affairs, and to (2) power to execute property contracts, did not reach the arbitration contract. The power to "institute legal proceedings" does not encompass the power to promise another party, pre-dispute, never to sue in court. And power to execute property transactions is not ordinarily understood as power to waive litigation rights generally, vis-à-vis another party.

With respect to the Clark power of attorney, the lower court announced common sense interpretive rules for Kentucky powers of attorney, and for determining agency relationships, and applied these rules. First, Kentucky powers of attorney are empowered only to reflect the intent of the principal. Under Kentucky law, all powers of attorney are interpreted in accordance with "the age-old principle that a power of attorney must be strictly construed in conformity with the principal's purpose." Pet. App. 28. Second, it is not reasonable to read all possible powers encompassed by the language of a power of attorney as powers intended by the principal. It is reasonable to expect that some powers are spelled out. Third, one source of guidance

for interpreting Kentucky powers of attorney, and determining the reasonable expectations of the principal as to legal language, is the Kentucky Constitution.

A. In Kentucky, powers of attorney are limited in their authority by the intentions of the principals.

Agency in Kentucky, as elsewhere, is something which must be proved up. *See Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky. Ct. App. 1990) (burden to establish Agency is upon the proponent thereof). According to the Kentucky Supreme Court, Kentucky powers of attorney are strictly construed, *Ping v. Beverly Enterprises*, 376 S.W.3d 581 (Ky. 2012); *see also Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429 (Ky. 1924), giving effect only to the purposes of the principal. *See Clinton v. Hibbs' Ex'x*, 259 S.W. 356, 357-358 (Ky. 1924) (agent's authority to conduct all business and execute all notes, at the agent's discretion, held not to encompass the power to bind the principal as surety). Under Kentucky law "[a]ctual authority arises from a direct, ***intentional*** granting of specific authority from a principal to an agent." *Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 830 (Ky. Ct. App. 2014) (*citing Mill Street Church of Christ v. Hogan, supra*) (emphasis added). "In construing the writing, the intent of the [principal and agent] must be ascertained and given effect. 2 C. J. 555." *Gabby v. Roberts*, 35 S.W.2d 284, 285 (Ky. 1931).

B. In Kentucky, powers of attorney do not encompass every plausible transaction under a literal reading of their language.

The Common Law recognizes a limitation to the reasonable expectation of language in a power of attorney with regard to transactions having consequences not apparently contemplated by the principal.

> [S]ome acts that are otherwise legal create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal. A reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment. In such circumstances, it would be reasonable for the agent to consider whether a person in the principal's situation, having the principal's interests and objectives, would be likely to anticipate that the agent would commit such a collateral act, given the nature of the principal's specific direction to the agent.

RESTATEMENT (THIRD) OF AGENCY § 2.02 comment h. (2006). It would be reasonable for any power over these collateral acts, or acts that have collateral effects, to be spelled out in the power of attorney.

Even where arbitration clauses are viewed as merely forum selection clauses, *see Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to

arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause."), this limitation applies. For example, should a forum selection clause provide that a Kentucky resident permanently select a jurisdiction other than that of Kentucky for future disputes between parties, *e.g.*, that of neighboring Ohio, the Common Law would logically require the power of attorney to specifically spell out the agent's authority on this matter. *See, e.g.*, *Baker v. LeBoeuf, Lamb, Leiby and MacRae*, 1993 WL 662352 *9 (S.D. Ohio) (where the U.S. District Court demanded that a power of attorney contain a forum selection authorization before a principal would be bound by an agent's agreement to litigate dispute in England).

There is a limit to the powers which Kentucky courts will infer into a general power of attorney. This is true even when the transaction contemplated is completely lawful and may in fact be in the principal's best interests. The Kentucky Supreme Court found it easiest to illustrate this point by referencing the most extreme of examples. As the Kentucky Supreme Court explained below,

> [i]t would be strange, indeed, if we were to infer, for example, that an attorney-in-fact with the authority "to do and perform for me in my name all that I might if present to make any contracts or agreements that I might make if present" could enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption;

> consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude. It would, of course, be absurd to infer such audacious powers from a non-specific, general, even universal, grant of authority.

Pet. App. 42.

The lower court's list may appear at first blush to be a "parade of horribles" as the Dissent below claimed. But such an appearance would be misleading. Arbitration is not being likened to consenting to an abortion, for instance, in terms of the magnitude of the effect on the principal. Rather, these hyperbolic examples are offered simply to prove a point: Some things are not within the reasonable expectations of the principal even if they can be plausibly encompassed by the literal reading of broad language.

For instance, a marriage is a contract, and a principal certainly has the right to marry in person. Marriage is also presumably a favored institution. *See Turner v. Safley*, 482 U.S. 78, 94-96 (1987) (recognizing a Constitutional right of prison inmates to marry). Additionally, marriage by proxy, via power-of-attorney, is also recognized in some U.S. jurisdictions. *See, e.g.*, COLO. REV. STAT. § 14-2-109 (West 2016); MONT. CODE ANN. § 40-1-301 (2016). Nonetheless, strict construction of powers of attorney in Kentucky means that a general power-of-attorney, without more specific language or without some other indicium of such power, would not intrinsically encompass the authority for the agent to marry off the principal. Such a requirement

exhibits neither discrimination against marriage nor serves as an obstacle to it.

That the Kentucky Supreme Court reads limitations into even the most general and universal of powers of attorney is a practice that preceded that court's line of arbitration cases. *See* Pet. App. 43-44 (lower court citing *Rice v. Floyd*, 768 S.W.2d 57, 59 (Ky. 1989) for this proposition). In *Rice v. Floyd*, without elaborating, the Kentucky Supreme Court announced that even the broadest power of attorney would not have all the authority a guardian might have. *Rice*, 768 S.W.2d at 59 (Ky. 1989) ("The scope of authority, duties and accountability of a guardian is much broader than that of a traditional power of attorney, even one intended to survive disability."). As explained by the Common Law,

> [i]t is because formal instruments are subjected to careful scrutiny that it is frequently said that they must be "strictly" construed. In fact, of course, they are construed so as to carry out the intent of the principal. * * * All-embracing expressions are discounted or discarded. Thus, phrases like "as sufficiently in all respects as we ourselves could do personally in the premises," "as the said agent shall deem most advantageous," "hereby ratifying and confirming whatever our agent shall do in the premises" are disregarded as meaningless verbiage.

RESTATEMENT (SECOND) OF AGENCY § 34 comment h. (2016).

Granting the power to contract may be more than "meaningless verbiage," but this is not to say that such a broad power does not have expected limits, such as in the case of entering into a marriage. The Kentucky Supreme Court is still going to recognize a limit as to what a principal expects of legal language used in Kentucky. One guide to such expectations is the Kentucky Constitution.

C. In Kentucky, the reasonable expectations of language used in a power of attorney are determined in part with reference to the Kentucky Constitution.

An interpreting Kentucky court must have guidance in determining which agency powers require setting out in a power of attorney due to the reasonable expectations of the principal regarding legal language. One such guide is Kentucky's foundational legal document, the Kentucky Constitution.

Kindred essentially makes two claims attacking the lower court's application of the Kentucky Constitution as an interpretive canon. First, Kindred claims that the Kentucky Supreme Court's appeal to the State Constitution constitutes a proscription; and that, with the incorporation of the Kentucky Constitution's understanding of the significance of jury trial rights, the Kentucky Supreme Court effectively signaled a refusal to enforce pre-dispute arbitration agreements. However, this claim is self-evidently incorrect. As the Kentucky Supreme Court explained,

> [w]e simply require, as we do with any contract, that the parties to be bound by the agreement validly assented. Nursing home residents may still enter into pre-dispute arbitration agreements and those agreements will be enforced, like any contract, if the agreement of the persons to be bound thereby has been obtained, either directly in person or by a duly authorized agent. We say only that an agent's authority to waive his principal's constitutional right to access the courts and to trial by jury must be clearly expressed by the principal.

Pet. App. 47.

Kindred's second claim is that, regardless of the reasoning, the Kentucky Supreme Court has explicitly required a heightened manifestation of awareness from a principal that a power of attorney encompasses an agency power to waive civil trial rights pre-dispute. It is not immediately evident why such a requirement should be illegitimate. This point notwithstanding, Kindred's claim actually misconstrues what the lower court has done.

The Kentucky Supreme Court announced what would be a Kentucky principal's reasonable expectations flowing from legal language used in a power of attorney. That is the Kentucky Supreme Court's job. This is not mandating heightened awareness; it is announcing an understanding based upon legal context, in this case a principal and agent operating in Kentucky, under the Kentucky Constitution.

Kindred argues however that the Kentucky Supreme Court's application of the Kentucky Constitution here is selective and in bad faith. Kindred points out that, despite the Kentucky Constitution's protection of the right to hold property, Kentucky courts routinely recognize that Kentucky attorneys in fact have the ability to compromise a principal's "right to acquire and dispose of property." Pet. Br. 26. Kindred cites to Justice Abramson's Dissent for this latter proposition. Pet. App. 93. However, if Respondents understand Kindred correctly, Kindred misstates the reality of Kentucky law. True, Kentucky attorneys in fact ordinarily buy and sell ***particular*** parcels of property. However, waiving the right to acquire and dispose of property generally, vis-à-vis another party, is a totally different matter. Kindred cites no authority for the view that an agent with generally-stated powers to enter into property transactions may waive a principal's ***right to own property***. Indeed, no precedent supports such a radical proposition. The Kentucky Supreme Court did not exhibit bad faith in concluding that the principals here had not contemplated agent power over the transactions in this case.

The Kentucky Supreme Court's holding explicitly affirms that pre-dispute nursing home arbitration agreements are enforceable, and can be executed by properly empowered agents. Kindred makes much of the fact that the lower court divided in this case. Yet, although she joined in Justice Abramson's Dissent, Justice Noble's penned-Dissent highlights the real nature of her disagreement as one directed not toward the reach of the FAA at all, but to the proper interpretation and construction of Kentucky powers of attorney.

> The problem is that the strict-construction rule originated in cases that addressed specific powers of attorney, and held that general language accompanying what was otherwise a specific grant of power should be read strictly so as not to expand the agent's authority beyond that intended by the principal.[6]

Pet. App. 105. That is, Justice Noble believed that the Majority's power of attorney ***interpretation*** was wrong – ***not*** that the Majority's interpretation was correct, but preempted by the FAA. Her criticism was premised upon the history of Kentucky powers of attorney interpretation.

> But in these cases, unlike some we have recently decided, such as *Ping*, we have been dealing with general powers of attorney, usually executed by a person concerned about becoming incapacitated, delegating to the agent the power to manage the person's affairs as a whole. Using the cases laying out the strict-construction rule to support our conclusion in *Ping* has caused confusion with respect to powers of attorney.

Pet. App. 106-107.

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[6] The Majority stated this: "Kentucky has long recognized that a power of attorney, should be strictly construed in conformity with the principal's purpose. *Harding v. Kentucky River Hardwood Co.*, 205 Ky. 1, 265 S.W. 429, 431 (1924). Consistent with this strict construction, our Court has held that 'powers of attorney delegating authority to perform specific acts, and also containing general words, are limited to the particular acts authorized.' *Id. citing U.S. Fidelity Co. v. McGinnis*, 147 Ky. 781, 145 S.W. 1112 (1912)." Pet. App. 64.

Justice Noble would have used different interpretive tools on the instruments. The Majority's Opinion represented a principled, if in Justice Noble's view mistaken, choice as to how to interpret Kentucky powers of attorney.

Even Justice Abramson's Dissent, joined by Chief Justice Minton and Justice Noble, strongly suggests that her disagreement with the Majority's Opinion was also fundamentally an objection to the Majority's power of attorney interpretation, rather than a belief in FAA preemption. *See* Pet. App. 89 n. 24 (arguing that the Kentucky Constitution's emphasis on trial rights limited to criminal trial rights). Notably, Justice Abramson authored the unanimous Opinion in *Donna Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), *cert. denied*, 133 S.Ct. 1996 (2013), wherein the lower court held that a similar power of attorney did not encompass the power to execute an arbitration agreement akin to those at issue here.

The point is this: The lower court's decision was in its essence an exercise in power of attorney interpretation, even if the Dissent believed that the Majority's interpretation was in error. As such, the only remaining question is whether this interpretation – that is, the principals' intentions in his or her power of attorney – are preempted by the FAA. Self-evidently, the FAA does not reach this far.

III. The Kentucky Supreme Court is the final authority for the meaning of Kentucky legal language.

Kindred proposes that it is "significant that Kentucky law erects no similar barriers to allowing state-appointed guardians – as opposed to attorneys-in-fact – to enter into arbitration agreements on behalf of their wards." Pet. Br. 22. This proposal is a misstep on Kindred's part.

Citing only U.S. District Court cases for this proposition, Kindred overlooks the appellate history of *LP Pikeville, LLC v. Wright*, 2014 WL 1345293 (Ky. Ct. App. 2014). In *Wright*, the Kentucky Court of Appeals determined that Kentucky's guardianship scheme does in fact provide the guardian with the power to execute pre-dispute arbitration agreements on behalf of the ward. However, notably, the Kentucky Supreme Court granted a motion for discretionary review of *Wright*, and the case is pending. That is, Kindred's guardianship proposition, to which they assign so much significance, may in fact be wrong. Kentucky's guardianship statutes might very well not bestow upon guardians the power to execute pre-dispute arbitration agreements.

Moreover, Kindred's analogy raises an interesting point, and provides a different, revealing analogy, regardless of the outcome of the *Wright* case: Who decides the ***meaning*** of Kentucky statutes?

Kentucky's guardianship statutes are arguably ambiguous as to whether they provide the authority

for a guardian to execute arbitration agreements such as those in question here. For instance, KY. REV. STAT. § 387.660 provides in part:

> A guardian of a disabled person shall have the following powers and duties, except as modified by order of the court:
>
> > (4) To act with respect to the ward in a manner which limits the deprivation of civil rights and restricts his personal freedom only to the extent necessary to provide needed care and services to him.

What does such language mean for arbitration authority purposes? In the *Wright* case, the State Supreme Court will determine whether the power to enter into a pre-dispute arbitration agreement on a ward's behalf is a power statutorily authorized to a guardian. This in turn will very likely require that the Kentucky Supreme Court determine the readable intentions of the Kentucky General Assembly. It will also perhaps mean looking to the Kentucky Constitution for guidance as to what the General Assembly meant.

Applying the rule of the Amicus American Health Care Association (a rule also implied by Kindred), this time to the guardianship schema, would mean that, "in light of the emphatic federal policy in favor of arbitral dispute resolution, [any State statutory scheme] that authorizes [a guardian, appointed for whatever party or purpose], to enter contracts must unambiguously

exclude the authority to enter into arbitration agreements before such an instrument can be held not to convey such authority in a case subject to the FAA." Such a rule would be a direction to State Supreme Courts as to how to interpret their respective legislatures' intentions. Yet such a direction would fly in the face of decades of this Court's jurisprudence, and scores of this Court's cases. *See, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) ("There is no doubt that we are bound by a state court's construction of a state statute.") (*citing R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992)).

Determining the ***meaning*** of a State legislature's statutory language – as opposed to the ***permissibility*** of the statute under U.S. Constitutional and federal law – is a task confined to the State Courts. Just as a State Supreme Court fulfills its judicial function by determining ***what the legislature meant***, a State Supreme Court simply fulfills its judicial function by determining ***what the principal meant*** when executing a power of attorney on that State's soil.

Whether or not a State legislature may discriminate against arbitration in its State guardianship statutes is of course a different question. However, presumably a principal, unlike the State legislature, may discriminate against arbitration as much as he or she wants, FAA or no FAA. If so, and if the State Supreme Court is the final word as to the intent and meaning of principals executing instruments, then this is an easy case for affirming the lower court.

IV. Kindred's construction of the Federal Arbitration Act would render it unconstitutional, as a violation of the Doctrine of Separation of Powers.

The long-established Constitutionality of the FAA is not in question in this case. Nonetheless, Kindred and their Amici propose a novel, unnecessary, and unwarranted construction of the FAA, a construction that would render it unconstitutional. Being a matter of interpretation of intent through analysis of legal language – in essence fact-finding as a matter of law – it would be a violation of the Doctrine of Separation of Powers for Congress to legislate federal preemption in the manner advocated by Kindred and their Amici.

Interpreting a power of attorney is a matter of determining a principal's intentions. It is not a matter of determining State law. By way of contrast, in *DIRECTV v. Imburgia*, this Court specifically noted that the lower California court had acted to interpret ***California contract law***, rather than the intentions of the parties. "The Court of Appeal did not explain why parties might generally intend the words 'law of your state' to encompass 'invalid law of your state.'" *DIRECTV v. Imburgia*, 136 S.Ct. 463, 469. If the California court's decision had been based upon a finding that the parties had indeed intended for the words "law of your state" to include invalidated State law, the result in *DIRECTV* would have been different.

Presumably the Separation of Powers doctrine protects State as well as federal judicial determinations. *See* U.S. CONST. amend. X; *see also Silverman v. Browning*, 429 U.S. 876 (1976) (*affirming Silverman v. Browning*, 414 F.Supp. 80 (D.C.Conn. 1976) (absent proof of prejudice or abuse of discretion, State courts must be permitted to exercise their judicial functions freely)). Certainly Congress has no ability to simply instrumentalize State courts and change their nature. *Cf. New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

Legislatures create substantive power. They do not have the power to tell the judiciary how to rule on a circumstance in front of a court. *U.S. v. Klein*, 80 U.S. (13 Wall.) 128 (1871). This Constitutional rule distinguishes between legislation directing how a court should rule, from a legislature creating new substantive law that happens to affect judicial determinations. *Id.* at 146-147. As this Court has noted,

> [n]o arbitrary rule of decision was prescribed in [*Pennsylvania v. Wheeling Bridge Company*, 59 U.S. 421 (1855)], but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Id.

While it is permissible for legislatures to direct an inference which can reasonably be drawn from a given set of facts, *see U.S. v. Gainey*, 380 U.S. 63, 67 (1965) (statute authorizing the drawing of an inference from a defendant's unexplained presence at an illegal moonshine still was constitutionally permissible as there is a rational connection between the facts proven and the ultimate fact inferred), here there is no such rational connection. To the contrary, Kindred contends that the inference of agency power must be assumed simply by virtue of its convenience to a federally-prescribed preference for arbitration. Legislating this kind of inference is Constitutionally impermissible. Congress cannot tell State courts how to find facts, nor how to interpret documents, unless there is a very clear logical inference that can be made between the facts and the mandated interpretation. Here, the legislative inference has been justified solely because of convenience to a federal policy favoring arbitration, not because of logic.

This Court should not assume, as Kindred apparently does, that the U.S. Congress intended such unconstitutional results. "It is, of course, desirable to salvage by construction legislative enactments whenever there is good reason to believe that Congress did not intend to legislate consequences that are

unconstitutional." *Welsh v. U.S.*, 398 U.S. 333, 355 (1970) (Harlan, J., *concurring*). Federal preemption is not triggered here because it is both unnecessary and illogical, and to do so would be a violation of the Separation of Powers doctrine.

V. By extension of Kindred's desired rule, the State law of agency will be federalized any time there arguably exists Congressional policy favoring or disfavoring anything.

Kindred and their Amici have periodically anchored their argument for federal preemption not simply on a perceived animus against arbitration, but on the simple fact that arbitration is a mode of dispute resolution favored by Congress. Kindred's argument thus portends federalizing all sorts of State law determinations regarding agency and authority, including both the reach of State guardianship statutes and the interpretation of State corporate laws, as they pertain to agency authority to enter into arbitration agreements. Moreover, encouraging arbitration is not the only Congressional policy that has been recognized by this Court, and, indeed, the list of activities and transactions that have been favored by Congress at one time or another is lengthy. *See, e.g.*, *Brown v. Pro Football, Inc.*, 518 U.S. 231, 253 (1996) (Congress seeks to encourage and protect the collective bargaining process); *see also Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 164-165 (1995) (Congress seeks to foster commercial competition, and to encourage technical invention); *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547,

572 (1990) (Congress has expressed a preference for expanding minority ownership of telecommunications licenses); *Preseault v. I.C.C.*, 494 U.S. 1, 3 (1990) (Congress has sought to encourage the development of recreational hiking trails on unused railroad tracks holding right-of-way via eminent domain); *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 595 n. 1 (1987) (Congress has sought to encourage development of mineral resources). Kindred's proposed rule threatens to begin down the slope of federalizing the State law of agency to a large extent.

Furthermore, if the Kentucky Supreme Court's interpretation of an agency instrument is subject to federal preemption, this opens up the proposition that factual determinations as to "the making of the agreement" could be preempted as well. This result would not be faithful to the intent of the FAA, which is simply to reverse the hostility of American courts to the enforcement of private arbitration agreements, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). Indeed, if "the making of the agreement for arbitration" is in issue, 9 U.S.C. § 4 includes the provision of a jury trial.

Presumably a jury trial might be had on the issue of assent, including the intentions of the parties. As one of the drafters of the federal statute in 1925,[7] Mr.

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[7] *See Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce among the States or Territories or with Foreign Nations: Hearings on S. 1005 and H.R. 646*

Julius Henry Cohen, General Counsel for the New York State Chamber of Commerce, stated in response to questioning by the Joint Subcommittees of the Committees on the Judiciary,

> [t]he one constitutional provision we have got is that you have a right of trial by jury. But you can waive that. And you can do that in advance. Ah, but the question whether you waive it or not depends on whether that is your signature to the paper, ***or whether you authorized that signature***, or whether the paper is a valid paper or not, whether it was delivered properly. ***So there is a question there which you have not waived the right of trial by jury on.***
>
> The CHAIRMAN. ***The issue there is whether there is an agreement to arbitrate or not.***
>
> Mr. COHEN. ***Exactly.***[8]

If there is a material question as to the making of the agreement, *e.g.*, a question as to the authority of a signatory, then the contesting party would be entitled to a jury trial on the matter. If a jury can make factual determinations about a party's intentions or authority, presumably having the arbitration agreement in view,

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Before the Subcommittees of the Committees on the Judiciary, 68th Cong. 10 (1924).

[8] *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce among the States or Territories or with Foreign Nations: Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 17 (1924) (emphasis added).

then a State Supreme Court can make a determination of a principal's intentions based upon the interpretation of legal language in a Common Law instrument. Kindred's position essentially renders the jury provision of 9 U.S.C. § 4 a nullity. For this Court to hold the Kentucky Supreme Court's decision preempted, and accept Kindred's proposed omnivorous interpretation of the FAA, would be to see the FAA as devouring itself. This Court has held that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause'" is rendered "'superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (*quoting Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Ironically, to respect the continued efficacy of the black letter of the FAA itself, Kindred's argument must fail.

CONCLUSION

For the foregoing reasons, the judgment of the Kentucky Supreme Court should be affirmed or the writ of certiorari dismissed.

Respectfully submitted.

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JANUARY 2017